

# **EXHIBIT B**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE: September 11th Property  
Damage and Business Loss Litigation 21 MC 101 AKH

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August 9, 2006  
2:15 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

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(In open court)

(Case called)

THE COURT: I've allowed the interests of justice and  
the full presentation of an account to outweigh whatever  
argument of finality should attach to my rulings of December.

Now the question is what is the substantive rule and  
how do you go about exploring it?

Let me give you a few of my initial musings to set the  
stage. The consent agreement attached to Con Edison's  
papers -- and for this purpose I don't distinguish between Con  
Edison and its insurers -- is entitled a consent agreement,  
more fully "Company consent to work premises, Trade Center  
Substation Manhattan, New York."

It is revised as of March 24, 1982, and it seems to me  
to implement the various clauses in the agreement between Con  
Edison and the Port Authority which created the foundation for  
the development of the Port Authority. The Con Ed substation  
was going to be the source of the electrical power that was  
fundamental to the operation of the complex. Con Ed was more  
than happy to provide that power, and Con Ed also saw to it  
that it had to have various protections so that the substation  
could remain a substation of integrity while all the complex

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23 building was going on around it.  
 24 So exercising the clauses of the contract with the  
 25 Port Authority, Silverstein proffered the various details of  
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1 its design to the Con Edison engineers who reviewed it so that  
 2 Con Edison could develop an independent base for evaluating the  
 3 work and assuring itself that its property would not be in  
 4 danger, its property and its business would not be in danger.  
 5 I think that is a more or less neutral account of what  
 6 happened. I held that there was a duty between the owners and  
 7 managers of the Port Authority to Con Edison so absent whatever  
 8 may come out of the further exploration of the agreements  
 9 between -- the question is, is the recourse of Con Edison  
 10 against only those owners and managers, that is, against the  
 11 Port Authority and Silverstein, not taking into account now  
 12 whatever particular clauses there may be in those  
 13 relationships, or is there a relationship sufficiently akin  
 14 between those of the design and construction contractors that  
 15 were involved in this series of meetings with Con Edison that  
 16 also creates a duty to Con Edison.

17 The few cases in this area which all of us have parsed  
 18 don't really help. This is really a new area under New York  
 19 law. It is surprisingly so, but it does seem to be so. So how  
 20 do you go about it? What do we do? How do you explore the  
 21 issue? I don't think I want to cut this off. I want this at  
 22 least: Ultimately, I'll have to issue a decision. My decision  
 23 will be better informed if I allow a fuller record to be  
 24 developed, but what kind of a fuller record?

25 Do I subject this issue to the overall issues or do I  
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1 take it apart? Can we have some kind of faster track for it?  
 2 Is the discovery boundless or can it be fairly limited? What  
 3 are really the propositions of law that drive this?

4 A few more musings. If Con Ed looked at this design,  
 5 and I assume the design showed the fuel tanks that went into  
 6 the Solomon floors --

7 MR. SACHS: Not at this stage. This is 1982 we are  
 8 talking about. Those fuel tanks didn't go in until the late  
 9 80's.

10 THE COURT: So the designs were just of the building  
 11 itself?

12 MR. SACHS: That's correct, sir.

13 MR. MALONEY: Do we know that it was in 1982?

14 THE COURT: Let's use a more formal format. You have  
 15 to address me, and we'll get this thing.

16 MR. SACHS: I am sorry, sir.

17 THE COURT: Let's go into this. Go ahead.

18 MR. SACHS: The consent agreement to which your Honor  
 19 refers is dated 1982. The affidavit of Mr. King refers to  
 20 meetings that took place at the initial construction of World  
 21 Trade Center 7 atop the Con Ed substation.

22 It is during those times that there were meetings on a  
 23 weekly or bi-weekly basis, according to Mr. King, among  
 24 Mr. Silverstein, Mr. Cantor and Mr. Roth, together with two Con  
 25 Ed representatives and representatives from the Port Authority

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at various times.

That building was completed at some point. The modification to the building to include the standby generating system or what was then Salomon Brothers was introduced, I believe, in 1988.

THE COURT: Is there any evidence of Con Edison being involved in that time?

MR. SACHS: No, sir.

THE COURT: None?

MR. SACHS: Not that I know of. You have to understand, your Honor, we have not even been able yet to find the file that contains this consent agreement, and the reason for that is simply that Con Ed totally restructured their engineering department, so I don't have any of the documents relating to those issues except what has been produced by other people. So all I can tell you is what I know as I stand here today.

THE COURT: What happened to Con Ed's files?

MR. SACHS: I wish I knew, sir. All I can tell you is this --

THE COURT: Did they go up in flames?

MR. SACHS: No, no. I can tell you what happened is that in the late 80's or early 90's Con Ed changed his whole engineering department. I have tried to track down where they moved to, where those files went to. I have been to -- I

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haven't been to, but I have had people go to various locations to try to find those files. To date, sir, I have not been able to find them.

We are continuing to have people look and are continuing an investigation. I believe they will be found because there is no reason that they shouldn't be, but I do not know where they are now and I do not have them right now.

THE COURT: What makes you think they'll be found?

MR. SACHS: Continuing effort and just my belief that they are somewhere that nobody has yet figured out in some archive some place. I may be wrong. That is just my hope.

Now, many of these things, your Honor, if I may, many of these things, there are memoranda of meetings that I suspect -- maybe if I'm lucky, Mr. Cantor, Mr. Cantor may have, Mr. Silverstein may have, Port Authority may not because some of their records certainly were destroyed in the destruction of World Trade Center I, but I believe there are going to be a lot of records with respect to what took place during these meetings. I just don't happen to have them.

THE COURT: How do you propose to go about obtaining them?

MR. SACHS: Well, if I may, if I may ask the court, it really depends for what purpose?

If the purpose is, as the court has come out and suggested, to go into more deeply the relationships among the

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parties for the purposes of determining what kind of relationships existed and whether that should give rise to a duty, and we are not dealing solely with a 12 (b)(6) motion, I

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4 think we first have to determine, as your Honor suggested, what  
5 standard is going to apply. This whole idea of a special  
6 relationship, as your Honor pointed out, I agree, the cases are  
7 not terribly helpful, although there are some guidelines.

8 I have some thoughts for the court and to discuss with  
9 the court as to what might be those standards, and then once we  
10 would decide what those standards may be, that would certainly  
11 help in determining what kind of discovery might be necessary  
12 to determine whether those standards were met.

13 THE COURT: What is your suggestion?

14 MR. SACHS: May I, may I suggest to the court first --  
15 and this is just prophylactic for me -- your Honor, of course,  
16 understands that we don't believe as a legal matter that  
17 privity or the functional equivalent of privity is necessary.

18 I understand that is your decision and that is the  
19 decision we are operating under, and so my suggestions go to  
20 that decision and to the language you used in that decision and  
21 not to whether or not that standard is the legal standard that  
22 should apply.

23 THE COURT: You'll save the broadest scope for the  
24 court of appeals.

25 MR. SACHS: Or if your Honor sometime would like to  
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1 hear more on the subject.

2 THE COURT: No. I think I've resolved that matter.

3 MR. SACHS: Okay. The only place we find any guidance  
4 at all, it seems -- and it is the guidance that your Honor  
5 suggested -- was in the Ossining case, and it was the  
6 three-pronged test contained in Ossining.

7 I would like to, I would like to discuss those three  
8 prongs because I think with some modification, they might  
9 served as some basis for determining whether a sufficient  
10 special relationship exists. In now Chief Judge Kay's opinion  
11 and her review on the law on the question of whether privity or  
12 the functional equivalent of privity is required of a plaintiff  
13 to state a cause of action, she was dealing with negligent  
14 misrepresentation cases, which is not what we're dealing with  
15 here, and she was dealing with a case where only, the only  
16 damage is economic.

17 She makes clear that the entire concern of the Court  
18 of Appeals in those cases is that in negligent misrep cases,  
19 whether they be the accountants in Ultramarines, whether they be  
20 the engineers or the weighers in Gallons --

21 THE COURT: Lancer against Shepard?

22 MR. SACHS: Right or whether they be the engineers in  
23 Ossining, her entire concern in those cases is what is an  
24 objectively foreseeable injury may be vast and unbounded,  
25 wholly disproportionate to a defendant's undertaking or

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1 wrongdoing.

2 THE COURT: I think Mr. Maloney will be very quick to  
3 point out that the illustration of that concern is this case.  
4 The outcome was a terrorist-related collapse of the building,  
5 not even primarily as the consequence of the impact into I and  
6 II, but secondarily, from the incredible burning of I and II.

7 MR. SACHS: With due respect, your Honor, we are not  
8 suing the terrorists here.

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9 THE COURT: I know you are not. You are suing the  
10 design professionals.

11 MR. SACHS: We are suing because a fire occurred. I  
12 don't think it matters, your Honor, how that fire occurred for  
13 the purposes of what we are doing here.

14 THE COURT: You are not going to persuade me on that  
15 point. This is one of the concerns I have.

16 Your focus of persuasion, and I am limiting it,  
17 anything else you have to do by way of appeal at the end of the  
18 case, your focus of persuasion is whatever a relationship was  
19 created or the functional equivalent of such relationship  
20 between those who you are suing and Con Edison.

21 MR. SACHS: That is what I am directing my comments  
22 to.

23 THE COURT: You must direct it to that because  
24 otherwise we'll pass you. That is why I am potentially  
25 reopening the case, just for that.

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1 You persuaded me that the meetings that occurred in  
2 1982 concerning the overall building showed that, potentially  
3 showed that kind of relationship. It may have been focused  
4 only on the issue of consent, in which case the defense may  
5 shift from absence of duty to assumption of risk, or it may  
6 have presaged a continuing relationship that dealt with the  
7 changes in design or improvements in design or modifications of  
8 the design of the building or its contents in the years that  
9 followed. That is why I am opening it. That is why I am  
10 potentially allowing discovery.

11 MR. SACHS: I understand, sir.

12 THE COURT: But I want the discovery limited.

13 MR. SACHS: I understand, and I think what I am going  
14 to suggest is going to limit it very much.

15 I believe the cases that Chief Judge Kay was referring  
16 to all dealt with the problem of the ambit of duty, the zone of  
17 danger, the scope of liability in a case where there is no  
18 physical damage; in other words, there is just economic damages  
19 and in a case of negligent misrepresentation.

20 And so the tests that were devised or that were set  
21 forth by Chief Judge Kay in Ossining have to be looked at and  
22 have to be viewed with that fact in mind, and it is in viewing  
23 those tests and suggesting how we might proceed to do what your  
24 Honor is asking that I intend to move.

25 Test No. 1, as both noted by the court and by Chief

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1 Judge Kay said the defendant must be aware that its work would  
2 be used for a particular purpose.

3 Well, it seems to me, your Honor, the only reason for  
4 Test No. 1 is to limit the exposure in economic damages cases;  
5 and, therefore, the purpose of that test is to limit it to a  
6 known purpose.

7 For example, let's take Ultramarines for one. There we  
8 know that the exposure could be endless. Once an accountant  
9 signs and audited statement, it could go on forever. The rule  
10 was or this test was devised that it should be for a  
11 particular, a known, a known plaintiff and for a particular  
12 purpose.

13 Here it seems to me there isn't going to be much

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14 question that the known plaintiff here is Con Edison upon whose  
 15 building this new office tower is designed and is going to be  
 16 constructed, and so I think the first area that would form the  
 17 basis for the test is essentially whether the design  
 18 professionals knew or reasonably should have known that this  
 19 particular plaintiff, Con Ed, the owner of the building, would  
 20 rely upon the design professionals to design a building or fuel  
 21 system that would not lead to the collapse of the building upon  
 22 Con Ed's substation.

23 In other words, a particularly known party, because  
 24 they're the one that you're using for the foundation, did they  
 25 understand that and did they act knowing that they had a duty

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1 to protect that foundation in their design.

2 Test No. 2.

3 MR. SCHRENKINGER: Your Honor, before he continues,  
 4 may I say something? I represent the Cantor defendants.

5 THE COURT: Let him finish.

6 MR. SCHRENKINGER: Okay.

7 MR. SACHS: Test No. 2.

8 THE COURT: The people who appointed me felt that I  
 9 could remember an argument for 15 minutes or so till the next  
 10 one came up. Now, it is a more risky proposition as the years  
 11 go by, but I think I'm all right so far.

12 MR. SACHS: Test No. 2, your Honor. I have that same  
 13 "years go by" problem.

14 Test No. 2 says reliance by a known party. Again,  
 15 here there is no question about the party. We know in the  
 16 negligent misrep cases and income damages cases, 532 Madison  
 17 Avenue case, there are hundreds and thousands of parties who  
 18 nobody knew and didn't know at the time the action took place.

19 Here at the time of this design, the meetings with  
 20 Cantor, the meetings with Emery Roth, et cetera, the scope of  
 21 the potential for liability and the potential for damage is  
 22 actually very narrow when we look at Con Edison. They were  
 23 discussing with Con Edison the steps that had to be taken while  
 24 they built this building to protect the building, and I believe  
 25 that they will testify, if I ask Mr. Cantor or I ask

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1 Mr. Silverstein or I ask Mr. Roth, that they knew very well  
 2 that Con Ed was relying upon them to design this in a safe  
 3 manner, and they did so or tried to do so when they were  
 4 building it.

5 This is not beyond what is a very narrow scope. We  
 6 are not talking about it going beyond the building that it is  
 7 on top of.

8 Test No. 3. Is the test that is called some conduct  
 9 by the defendants linking them to the party or parties and  
 10 evincing their understanding of the reliance of the known  
 11 party. Again here we have a situation in which we have design  
 12 professionals who are building a structure on top of another  
 13 structure. They consult with representatives of Con Ed. They  
 14 consult with their own people they contracted with, whether it  
 15 be Mr. Silverstein or whether it be Port Authority or whether  
 16 it be their subcontractors, and in all of that it is highly  
 17 likely that there were discussions as to how to protect this  
 18 substation and what their role and what their duty was and who

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19 was relying upon it.

20 Again I think those three tests, if applied as  
21 modified -- in other words, when we realize what the purpose is  
22 of those tests and what we're trying to find well lead us to  
23 whether or not there is a special relationship.

24 We are dealing here with a duty of care in a  
25 negligence case. I understand, in reading this court's

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1 opinion, this court is talking about some kind of a special  
2 relationship. I suggest I don't know that it has to be privity  
3 or akin to privity, and I think the court used different  
4 languages it went through. It was clearly talking about a  
5 special relationship and clearly was referring, I think it was,  
6 referring to Ossining and the tests that were used by Ossining.

7 I think those can be used by us in terms of trying to  
8 measure what is somewhat amorphous, an amorphous term what is a  
9 special relationship when you're talking about a lease entered  
10 into by Con Ed with the Port Authority that contemplated  
11 sometime in the future a rather large office building was going  
12 to be built above it.

13 I don't think there is any question but that the  
14 parties contemplated that the Port Authority was going to hire  
15 design professionals. It turned out it then leased it to  
16 Silverstein who hired design professionals, but there were  
17 going to be design professionals who were going to be building  
18 this building, and these design professionals were going to owe  
19 a duty to Con Ed just as the Port Authority would owe a duty to  
20 Con Ed. I don't think there is any question about that.

21 Let me get to the end of this because --

22 THE COURT: I don't assume it.

23 MR. SACHS: Let's see what discovery shows.

24 I suggest to the court that one possible way and one  
25 rather short way to determine whether or not this is so would

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1 be to allow us to take a very limited deposition of Mr. Cantor,  
2 of Mr. Roth, of Mr. Silverstein, and ask them some very simple  
3 and very limited questions. I am talking about extremely  
4 limited.

5 THE COURT: How long will it take you to find your  
6 files?

7 MR. SACHS: I have no idea.

8 THE COURT: A better question: How long shall I give  
9 you to find your files?

10 MR. SACHS: Judge, I have no way to even answer that  
11 question.

12 THE COURT: will, I can't have a time period without  
13 end. I think 60 days. You've had time since the beginning of  
14 this case. The case was begun in 2002 and 2004. So let's say  
15 2004, you have had at least two years, and you have known about  
16 the decision since December -- January, January 12, 2006 is  
17 when I issued it. So it is another six months.

18 MR. SACHS: The first time I even knew that such a  
19 file existed, your Honor, was in May of this year. Believe me,  
20 I have been trying desperately to find that file. There are  
21 other alternatives.

22 THE COURT: Yes, there are other alternatives. I  
23 think I should give you a limited time to find papers. After

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24 that you'll have to get permission from me in order to use  
25 them. I think 60 days is a reasonable period of time.

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1 Let me hear from some of your adversaries.  
2 MR. SCHRENKINGER: Your Honor, Steve Schrenkinger. I  
3 represent the Cantor defendants.  
4 THE COURT: Yes, Mr. Schrenkinger.  
5 MR. SCHRENKINGER: First of all, going back to what  
6 Mr. Sachs was recently referring to and your questioning of Mr.  
7 Sachs about the fuel tanks, I think what we are losing here is  
8 sight of what the scope of this consent agreement entailed.  
9 This wasn't something where Con Ed had a relationship  
10 with the engineers, where they were looking at the designs,  
11 checking over the designs, consenting to designs. This was  
12 pretty much to make sure that the Con Edison substation wasn't  
13 harmed during the course of construction. They were doing  
14 construction on top of the Con Edison's property, so Con Edison  
15 was just looking out to make sure that there wasn't any damage  
16 done during the course of that construction, and if there was  
17 any damage that was done, they would be duly compensated.  
18 THE COURT: What is the implication of that?  
19 MR. SCHRENKINGER: We are not talking about something  
20 that happened after-the-fact; we are not talking about  
21 plaintiff's theory of the case, that this generating or fuel  
22 tank allowed for a fire to continue uninterrupted.  
23 THE COURT: Suppose someone from Con Ed told someone  
24 from Cantor, look, as long as you're with this building -- and  
25 I want Silverstein to know this as well -- anything you do with

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1 these designs that raises the risk, I want to make sure you let  
2 us know so we can give consent. Suppose someone said that and  
3 it was accepted by Cantor, and Cantor signed off of Salomon's  
4 plan to have generating in the building.  
5 MR. SCHRENKINGER: First of all, we are losing sight  
6 of the fact also that Cantor was a structural engineer.  
7 THE COURT: Answer my question.  
8 MR. SCHRENKINGER: I don't think we have any evidence  
9 of that even being close to the case. There might be now  
10 because --  
11 THE COURT: One of the privileges of my rank is that I  
12 can make up hypotheticals. One of your obligations is to try  
13 to answer them.  
14 MR. SCHRENKINGER: I still don't think that would  
15 arise in this relationship. Why wouldn't this hypothetical be  
16 made by the plaintiff during opposition to the original motion?  
17 THE COURT: We are passed that. Mr. Schrenkinger, we  
18 are past that. Don't reargue that which I just decided. That  
19 was only two days ago.  
20 MR. SCHRENKINGER: I know.  
21 THE COURT: Why don't you assume I knew what I was  
22 doing. Maybe I made a mistake, but I knew what I was doing.  
23 What is the implication?  
24 Now, we have got a problem not out of the original  
25 design, no one is suing over the original design. There is an

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1 interesting ellipse in what Mr. Sachs is contending and what he  
2 brought out to me. There is something that happened several  
3 years afterwards, but he has shown enough to make me concerned  
4 that there is some kind of a continuing relationship and maybe  
5 obligation arose out of this series of meetings that is  
6 reflected and resulted in the consent agreement of 1982. I  
7 want to know about that. Before I sign off on this case, I  
8 want to know about that.

9 MR. SCHRENKINGER: I understand. That will come out  
10 during the course of discovery.

11 THE COURT: What should be the limit of discovery?  
12 what should be the scope of discovery?

13 MR. SCHRENKINGER: That is something I was wrestling  
14 with, too: What should be the limited scope of discovery?  
15 What happens after 60 days he doesn't find these  
16 memos, these memoranda, and then there is a decision issued  
17 that there was no special relationship and then there is new  
18 discovery again a couple of months after where --

19 THE COURT: Thank you very much, Mr. Schrenkinger.

20 Mr. Maloney, can you help me?

21 MR. MALONEY: I think your Honor's suggestion is  
22 sensible. Why don't we find out what these documents are, and  
23 once we have that, then we can deal with the next step, which  
24 is potentially scheduling minor discovery around those  
25 circumstances or figuring out if there is an alternative way to

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1 get the information. The problem is we are in a vacuum. We  
2 don't know what was at these meetings or what happened. So I  
3 think the first thing is to see if there are records that exist  
4 that can answer that question. It is sensible to see if we get  
5 them.

6 THE COURT: Do we know the identities of the design  
7 and construction people that focused on the Salomon plans?

8 MR. MALONEY: Yes. We know that one of the people who  
9 focused Salomon in order to be sure that they were in an  
10 expedited process hired the same person who Silverstein had as  
11 the structural engineer for the building, which was --

12 THE COURT: Cantor?

13 MR. MALONEY: -- Cantor. He was this person for  
14 Salomon as well as for Silverstein, as well as for prior  
15 building to make sure they weren't doing anything to affect the  
16 integrity of the building.

17 THE COURT: It seems to me everybody ought to do a  
18 double-check on the files for the next 60 days, and I mean the  
19 active involvement of the lawyers as well. I want a thorough  
20 review of the files. At the end of the 60 days, I want a  
21 supplementary production, a supplementary production of  
22 anything that comes up that has anything to do with the  
23 development of the designs, meetings that were involved with  
24 any representatives of Con Edison and communications back and  
25 forth. I want a broad scope of review.

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1 Then I want production in the next 10 days after that  
2 along with logs that identify specifically satisfying the  
3 requirements of the local rules of any documents not produced  
4 but which fit the scope.

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5 Then it seems to me we ought to have another meeting  
 6 on discovery proposals. I want discovery proposals. I want  
 7 deposition proposals. I will consider it at that time whether  
 8 I should vacate my decision of January 12th, 2006 as it relates  
 9 to the people who were dismissed or whether there should be  
 10 further exploration of the issue. That is my proposal.

11 MR. SCHRENKINGER: Your Honor --

12 THE COURT: Mr. Maloney first.

13 MR. MALONEY: I think it is sensible. The only  
 14 mechanical question, to the extent you want everyone to produce  
 15 that, I take it Citigroup will undertake to look during the 60  
 16 days.

17 THE COURT: I think everyone, everyone should look  
 18 because if there were meetings, these are the kinds of meetings  
 19 that you need an assembly hall to fit everyone in. There are a  
 20 lot of people taking minutes of the meetings.

21 Ms. Jacob, do you want to say something?

22 MS. JACOB: Beth Jacob, representing the Port  
 23 Authority.

24 I am not revisiting the court's proposal just now we  
 25 look again for the next 60 days, although the Port Authority

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1 has looked a number of times. I want to clarify we are, we are  
 2 talking about document production, not about necessarily  
 3 identifying individuals who might still be around.

4 THE COURT: Ms. Jacob, that should be my comment, too,  
 5 I should have included that.

6 MS. JACOB: We should.

7 THE COURT: We should, yes.

8 MS. JACOB: Our concern, and we have identified some,  
 9 we are talking about the Port Authority going back to talking  
 10 to people may have been around in the 1960's, not just the 80's  
 11 with respect to relationship between Port Authority and Con Ed.

12 The idea I want to present, which I assume we'll  
 13 discuss more when we reconvene in 60 or 80 or whatever days, is  
 14 that this now is not narrow focused discovery, at least not  
 15 with respect to most of the litigation. What we are talking  
 16 about now is discovery with respect to how the building was  
 17 constructed, whose responsibility, certainly with respect to  
 18 the relationship between Con Ed, Silverstein and the Port  
 19 Authority, and as we get into the late 80's, bringing in  
 20 Salomon. This is very much the crux of the case.

21 THE COURT: Let me narrow this. I take the point, Ms.  
 22 Jacob. It is a good point.

23 Mr. Sachs, in my interpretation, has a claim because  
 24 of two areas of risk. One is the Salomon system of generation  
 25 of independent power, to have a 24-hour-a-day, 7-day-a-week

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1 trading floor. That is one measure of risk.

2 The second measure of risk has to do with the city and  
 3 its needs in any design that was involved with that. There are  
 4 two different issues.

5 Let me talk first about the Salomon issue. It seems  
 6 to me that the consent agreement of 1982 is not really what Mr.  
 7 Sachs has in mind. Con Ed signed off on that. It may not be a  
 8 problem with the duty would be trumped by assumption of risk,  
 9 it seems to me, unless things changed in some material way or

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10 the construction was not according to design in some material  
11 way, "material" meaning adding to risk.

12 What he has in mind is what happened in 1986 with the  
13 Salomon focus. The question will arise what was Con Edison's  
14 involvement with those who were involved in the creation of a  
15 design and the implementation of a design? I think that is the  
16 gravamen of this claim.

17 MR. SACHS: That is not totally accurate, your Honor.  
18 I believe the gravamen of our claim, the second part  
19 is true, the 1986 changes. We also are very much interested in  
20 the original design of this building. This building was  
21 designed in such a way as to -- it was designed with a  
22 non-redundant transfer trust system that made the building  
23 susceptible to collapse if that system was overheated and  
24 destroyed or plasticized by a fire.

25 THE COURT: You probably saw this in the plans.  
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1 MR. SACHS: Your Honor, there has never been a review  
2 of any Con Ed plans or will there be any evidence that Con Ed  
3 reviewed these plans with a structural engineer or anybody like  
4 that or did anything anywhere near what an owner did or Port  
5 Authority did.

6 THE COURT: I can't narrow it the way you did.

7 MR. SACHS: It wouldn't narrow, your Honor.

8 THE COURT: Ms. Jacob's point is accurate. The burden  
9 on creating is a significant burden. I don't know what to do,  
10 Ms. Jacob. I think it is inherent in the litigation. Since  
11 you are going to be continuing this litigation anyhow, I am not  
12 so sure the incremental burden is that great.

13 MS. JACOB: Your Honor, my concern is not so much  
14 having to work over the next 60 days, that is fine. My concern  
15 is that we don't want to be precluded from bringing in evidence  
16 that we might not unearth in 60 days.

17 THE COURT: You might not find it in that 60 days?

18 MS. JACOB: That's correct.

19 THE COURT: Well, what am I to do, just forget about  
20 my decision?

21 MS. JACOB: Your Honor, my suggestion would be that  
22 perhaps we don't need -- I agree that there should be a  
23 deadline by which people should try to find their files and I  
24 would agree that Con Ed should be given a deadline, and fairly  
25 short deadline, maybe 60 days, to find this missing file that

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1 perhaps they should have figured out there was an engineering  
2 file sometime before this May.

3 But since this area goes to very much I think the  
4 heart of a lot of this case, perhaps we don't need expedited  
5 discovery or separate discovery or an early resolution of it.  
6 The Cantor signer defendants are being brought back in as third  
7 parties anyway. Silverstein is in the process of doing that.  
8 The rest of us will bring cross-claims anyway. They will be in  
9 the litigation.

10 Maybe we should permit the discovery to proceed as it  
11 is going now so everybody has a full opportunity to discovery  
12 as we need and things aren't missed, I don't want to say in  
13 haste, but things aren't missed because of deadlines, and more  
14 toward the end of that discovery this motion can be renewed by

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15 Con Ed. If at that point Con Ed has managed to prove it has a  
 16 claim against Cantor, because they will be in this case, it is  
 17 not we need them to be a named party by Con Ed in order for  
 18 them to be responsible. That is our proposal.

19 We have begun discovery. We set up a document  
 20 repository. Documents are being produced. We are in the  
 21 process now of doing quality checks of the first 4,000  
 22 documents. It is not as if nothing has happened. We are  
 23 concerned if every time somebody brings up a motion, we have a  
 24 separate perhaps focus, perhaps not so focused bit of  
 25 discovery, it will distort our ability to move the case.

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1 THE COURT: Under the case management order of July  
 2 18, production of documents was to begin by August 22, 2006.  
 3 It doesn't say when it is to end, and it says that depositions  
 4 are to await document production and document review.

5 60 days from today is roughly mid-October. I think it  
 6 would be quite reasonable to have closure on document  
 7 production by around that time for the limited purposes of our  
 8 assemblage today and for the general purposes of this entire  
 9 litigation. We are not going to be litigating this for our  
 10 professional lives.

11 MS. JACOB: My only comment on that is that according  
 12 to the case management order, I believe we have until December  
 13 1 to bring third-party actions as of right.

14 THE COURT: That is much too far off. If that is the  
 15 case, I need to amend that. I don't propose to have this case  
 16 go on that kind of a leisurely schedule. It is not going to  
 17 happen.

18 MS. PRINGLE: Your Honor, Katherine Pringle, and I  
 19 represent Silverstein Properties and also 7 World Trade Center.

20 We anticipated I think some of the concerns that  
 21 you're raising; and, therefore, served either 214 (d) notices  
 22 or third-party claims.

23 THE COURT: That is a 214 notice?

24 MS. PRINGLE: The notices required under 214 (d)(2) to  
 25 design and construction professionals.

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1 THE COURT: Under the CPLR?

2 MS. PRINGLE: Correct. Those parties are out of this  
 3 case because we found they don't owe a direct duty to Con Ed we  
 4 have sought to bring back into this case on the theory that,  
 5 okay, whether or not they owe a direct duty to Con Ed, they owe  
 6 a direct duty to us. If we are liable on a contingent claim,  
 7 if we liable, which we don't think they are, those third  
 8 parties are liable as well. That process of bringing them back  
 9 into the case is well under way.

10 THE COURT: I hope you come to regret that decision.

11 MS. PRINGLE: Well, our point is that again we don't  
 12 believe we are directly liable.

13 THE COURT: I think you are doing things by the book  
 14 rather than according to any real understanding of what is  
 15 going on, but I am just a judge.

16 MS. PRINGLE: Our thinking was --

17 THE COURT: I know what your thinking was.

18 MS. PRINGLE: If the parties are to be brought back  
 19 into the case, we should do it sooner than later.

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20 THE COURT: I know if you bring them back, it is  
21 better to do it sooner, but it might have been better not to  
22 bring them back.

23 Mr. Sachs, you are the one interested in moving this  
24 case?

25 MR. SACHS: Yes.

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1 THE COURT: December is too late.

2 MR. SACHS: I actually opposed that. I didn't want  
3 third-party complaints to go out that way.

4 THE COURT: Production is going to end.

5 MS. JACOB: I hate to interrupt the court.

6 Before the court sets the date, what has held things  
7 up really over the summer has just been getting the document  
8 repository under way, and I think we might need a little more  
9 information to know how rapidly documents can be loaded into  
10 the document repository and made available. There is a bit of  
11 lag at the beginning which we believe will make things move  
12 much, much faster once the documents get in the repository and  
13 all the parties have access to them.

14 THE COURT: Is there a repository?

15 MR. SACHS: There is.

16 MS. JACOB: It is set up and we have begun producing  
17 the documents.

18 THE COURT: Are you producing electronically?

19 MR. SACHS: Yes, we are, and we worked very hard over  
20 the summer to get this going. There are glitches. Those  
21 glitches are not anybody's fault. There are electronic  
22 glitches, but we should be up and running in a week or so, we  
23 hope.

24 THE COURT: Are the documents being put in by picture?

25 MR. SACHS: They're in. They have been coded and

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1 scanned.

2 MS. JACOB: It depends to some extent on how old the  
3 documents are and what the original form is. If they exist  
4 electronically, they were produced electronically. The old  
5 documents were produced in hard copy. They're being scanned  
6 in, and it is an existing image, but a searchable image. The  
7 expedited discovery involved in Citigroup's motions or  
8 potential motions, those documents have been produced to the  
9 repository.

10 What we have is 4,000 of them, I believe, which we are  
11 now reviewing to make sure all of the processes are working  
12 well before we make a mistake with hundreds of thousands of  
13 documents. That is going to take some time.

14 THE COURT: I propose that document production end by  
15 October 13.

16 MR. SACHS: 13?

17 THE COURT: Is that unfeasible, Ms. Jacob?

18 MS. JACOB: I am not sure. It is depending on how  
19 many there are. I don't think there is any way the document  
20 repository itself will get them all in and get them out to  
21 people, to have people to have an opportunity to review them.  
22 If this means --

23 THE COURT: No, not review. October 13th to get all  
24 production complete in the case and on this particular issue as



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1 MS. JACOB: Yes, your Honor.  
2 THE COURT: Notwithstanding due diligence, if you  
3 can't do it by October 13th, you'll ask me for an enlargement.  
4 I would like it done by October 13th.  
5 I would like to start depositions in a month or so  
6 after that, but we should have our next meeting in October. I  
7 propose a meeting at 2:00 o'clock on October 27th, Friday. The  
8 purpose of that meeting will be to establish deposition  
9 schedules and chart discovery thereafter in the case as a whole  
10 and this case. Ms. Jacob has a good point, that we might be  
11 creating too many tracks if we try to do this separately.  
12 MR. SACHS: I concur with counsel, your Honor, but may  
13 I just suggest to the court that if these documents are going  
14 to be produced on October 13th, I know the system and the  
15 electronic system means it is going to take several weeks for  
16 these documents, which I assume are going to be very  
17 substantial in the whole case to be scanned and coded and  
18 available to even look at.  
19 I don't believe we'll even get to them. If they were  
20 produced by the 13th and, Beth, correct me if I am wrong, but I  
21 don't believe -- Mr. Leavy has been working on this -- I don't  
22 believe we will have them to look at, I don't think the parties  
23 will have access to them for probably close to 30 days  
24 thereafter. Am I correct about that? Am I?  
25 MR. LEAVY: Michael Leavy from the firm of Gennet,  
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1 Kallmann, Antin & Robinson for Con Ed. Yeah, there is a  
2 built-in delay between the time --  
3 THE COURT: I take your point. November 30 might be  
4 more realistic, which is a Thursday, at 4:00 o'clock. That is  
5 the week after Thanksgiving. Is that going to be a terribly  
6 inconvenient week for anybody?  
7 MR. SACHS: No.  
8 THE COURT: November 30.  
9 MR. SACHS: That is for the next meeting, your Honor?  
10 THE COURT: Yes. To go back here, if we are going to  
11 produce documents beginning August 22, I would like August 15  
12 to be the last date to discover documents relevant to the  
13 issues that we're meeting on today.  
14 MR. MALONEY: I couldn't hear you.  
15 THE COURT: I would like August 15th.  
16 MR. SACHS: I thought you were giving us 60 days, your  
17 Honor, on the --  
18 THE COURT: Sorry. I have got this wrong.  
19 MR. SACHS: You just gave me a --  
20 THE COURT: Sorry. I said 60 days from today.  
21 October 13.  
22 MS. PRINGLE: Could you repeat the purpose of the  
23 October 13th date.  
24 THE COURT: For documents that have not been located  
25 to date dealing with the design and construction of the  
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1 building and identifications of witnesses involved in that  
 2 insofar as they relate to this argument of a relationship with  
 3 Con Edison. In other words, what we're really interested in to  
 4 see is what was Con Edison's involvement in reviewing the  
 5 design for the Salomon generation, power generation scheme.

6 MR. SCHRENKINGER: Your Honor, may I ask something?

7 THE COURT: Yes.

8 MR. SCHRENKINGER: That is what I am a little confused  
 9 about. From what I understood from the plaintiff's papers, Con  
 10 Edison's papers, they were talking about Con Edison's  
 11 involvement with the original design and construction of the  
 12 building.

13 THE COURT: 1982.

14 MR. SCHRENKINGER: It is my understanding the Salomon  
 15 project, while it was a big project and part of that building,  
 16 it was a separate project, it might have been the engineer on  
 17 both the original design and tenant fit-out for Salomon  
 18 projects.

19 THE COURT: So?

20 MR. SCHRENKINGER: My question is the cutoff date for  
 21 the Con Edison involvement. Are you referring to the design  
 22 and construction of the building, design and construction of  
 23 the Salomon Brothers' project?

24 THE COURT: Both.

25 MR. SCHRENKINGER: Thank you.

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1 THE COURT: I am not going to schedule a separate  
 2 meeting for this issue. We'll take it up on November 30. Any  
 3 comments? Are my views understood?

4 MR. SACHS: Yes.

5 MR. SCHRENKINGER: Yes.

6 THE COURT: In evaluating what I will have to do, my  
 7 tentative thinking is that Mr. Sachs is going to have to show  
 8 that Con Ed made it clear to those professionals who  
 9 Silverstein engaged that Con Ed would have a continuing review  
 10 relationship to assure itself that nothing material would be  
 11 changed in the setup of the building that would cause danger to  
 12 Con Ed. I think that would show the kind of functional  
 13 equivalent of privity that Judge Kay had in mind in the  
 14 Ossining case.

15 The citation for Ossining is Ossining Union Free  
 16 School District v. Anderson, 73 N.Y.2d 417 (1989)..

17 MR. SACHS: In your concept of how this goes, your  
 18 Honor, when would we have an opportunity to address legally  
 19 whether that should be the standard for review of special  
 20 relationship?

21 THE COURT: I am not looking to change the rule I  
 22 expressed.

23 MR. SACHS: I am not, either. That wasn't my point.  
 24 Let me be specific. You used the phrase that Con Ed told the  
 25 design professionals that it would have a continuing

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1 opportunity to review. That is not in Ossining. That is not  
 2 anywhere that I can find, and all I am asking is --

3 THE COURT: That is my interpretation of the  
 4 functional equivalent to privity.

5 MR. SACHS: So we have no opportunity to argue --

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6 THE COURT: Judge Kay's first point is the defendant  
7 must be aware that its work would be used for a particular  
8 purpose.

9 MR. SACHS: Right.

10 THE COURT: The second point, plaintiff must rely upon  
11 defendant's work.

12 MR. SACHS: Correct.

13 THE COURT: The third point, there must be some  
14 conduct by the defendant linking it to the plaintiffs and  
15 evincing its understanding of that reliance.

16 MR. SACHS: I understand those tests.

17 THE COURT: That relates to what I just said. Now, if  
18 you find a different way of applying that, that is open to you,  
19 Mr. Sachs.

20 MR. SACHS: It is the three prongs of that test you  
21 are summarizing what you think it means. Is that what I  
22 understand from this?

23 THE COURT: Yes, essentially.

24 MR. SACHS: Thank you.

25 THE COURT: Essentially. I am not saying I am  
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1 summarizing it. It seems to me that would illustrate, in my  
2 view, what Judge Kay had in mind.

3 MR. SACHS: There might be other illustrations that  
4 could do the same.

5 THE COURT: There might well could be other  
6 illustrations.

7 MR. SACHS: Thank you, sir.

8 THE COURT: I am applying the rule. I don't think it  
9 applies only to cases of representations, negligent  
10 misrepresentations. I think it applies just as well to the  
11 kind of case we have, and in terms of representations, you can  
12 look at a set of plans, representations of what is going to be  
13 built. I am not sure it is different. In any event, I am  
14 applying that rule.

15 MR. SACHS: I hear you. I understand. I wanted to  
16 clarify for myself, sir. Thank you.

17 THE COURT: Okay. Let me go back to a comment Ms.  
18 Pringle made. If plaintiffs are suing for the negligent  
19 creation of a risk to Con Edison's substation, and if  
20 Silverstein engaged someone to do a building that he did, why  
21 can Silverstein's liability be laid off on contractors that  
22 Silverstein engaged, recognizing that Silverstein had his own  
23 professionals who were doing what the contractors did and that  
24 the building stood in very fine fashion for so many years until  
25 it burnt on September 11th and collapsed.

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1 What is the rationale for bringing in third parties?

2 MS. PRINGLE: Your Honor, I think there are two points  
3 that are raised by your question:

4 First, I think the fact that the building stood for so  
5 many years, et cetera, suggests there is no liability by  
6 Silverstein. But what plaintiff has alleged is two-pronged:  
7 Number one, that there was some sort of design defect in the  
8 building; and, number two, that we allowed our tenant Citigroup  
9 to come in and build a system that ultimately they allege  
10 turned out to be defective.

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11 From the perspective of Silverstein, they made none of  
 12 those decisions. Those decisions, what they did do was to hire  
 13 outstanding contractors.

14 THE COURT: I don't believe it, in that Silverstein  
 15 rendered the building to Salomon and Salomon insisted I want a  
 16 24-hour-trading floor, the implications of that was to have an  
 17 independent source of power. So the condition of the rental  
 18 was the very condition that created the risk that Silverstein  
 19 assumed.

20 MS. PRINGLE: However, there is more to it than that  
 21 which is important. It is not as though Silverstein simply  
 22 said to Salomon we will take care of all of that. What they  
 23 said is we will give you permission to build your own system,  
 24 and they came in and built a system which Silverstein reviewed  
 25 merely for the question of whether it would fit within or harm

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1 the existing structure.

2 THE COURT: I don't believe it.

3 MS. PRINGLE: In other words, you can't drill it into  
 4 a concrete --

5 THE COURT: I don't believe it. That is not the way a  
 6 major real estate owner operates in the City of New York.

7 MS. PRINGLE: We will demonstrate, we are quite  
 8 confident, through discovery that the responsibility for the  
 9 Salomon system was undertaken by Salomon.

10 In addition to that, there are agreements as between  
 11 the Port Authority, Salomon and 7 World Trade Center, in which  
 12 Salomon undertook to indemnify both the Port and Citigroup --  
 13 excuse me -- and 7 World Trade for any damages arising out of  
 14 their fuel system, and there are three separate agreements.  
 15 They were done in great detail and it makes it very clear that  
 16 any obligations for harm arising out of that system were  
 17 assigned by the three parties to Salomon and Salomon alone.

18 THE COURT: I would like to consider when we have our  
 19 next meeting whether all those third-party claims should be  
 20 deferred for resolution after the resolution of the case in  
 21 chief. I think there is a real risk that the third-party  
 22 claims will get in the way of the primary claims and that it  
 23 would defeat the interests of justice to have everything  
 24 litigated at the same time.

25 MS. PRINGLE: I appreciate your point, your Honor, and  
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1 we'll be prepared to discuss that at the next meeting. I would  
 2 just note at this stage that there will be discovery of those  
 3 third parties, they will be at the table because so much of  
 4 this turns not on decisions that --

5 THE COURT: You may have to do it again.

6 MS. PRINGLE: I think that is not in the interests of  
 7 justice to do this case intentionally twice.

8 THE COURT: You may have to do it again. You may have  
 9 to do it again.

10 MS. PRINGLE: I understand, and we'll be prepared to  
 11 discuss that.

12 THE COURT: There are primary claims and there are  
 13 secondary claims. Your theory of liability is you aren't or  
 14 may be liable. What you are talking about is you may be liable  
 15 and you may never be liable. If you are liable, it may be on

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16 particular grounds that will not be involved in third-party  
17 complaints, and I don't think it is prudent in terms of economy  
18 or efficiency to do both things at once, but we'll consider  
19 that at a later time. I want to give you a heads-up.  
20 MS. PRINGLE: Would you prefer to have briefs on that  
21 in advance of our next meeting? There is quite a bit of law in  
22 this area.  
23 THE COURT: If we'll have briefs, I'll ask for them at  
24 the time.  
25 MS. PRINGLE: Sorry?  
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1 THE COURT: If we have briefs, I'll ask for them at  
2 the time. No, I don't want any briefing now.  
3 MS. PRINGLE: Thank your Honor.  
4 THE COURT: Anything else for anybody? Enjoy the rest  
5 of the summer. I'll see you on November 30th.  
6 (Court adjourned)  
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